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In The

Supreme Court of the United States

October Term, 1994

ALSTON R. KEENER,

Petitioner,

v.

EXXON COMPANY, USA, and EXXON CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD J. BASHMAN
MONTGOMERY, MCCRACKEN, WALKER & RHOADS
Three Parkway – 20th Floor
Philadelphia, PA 19102
(215) 665-7200

PAUL CRANSTON
7000 Hampton Center, Suite I
Morgantown, WV 26505
(304) 599-8787

THOMAS M. WILSON, III*
LYNN A. KOHEN
TYDINGS & ROSENBERG
100 East Pratt Street
Baltimore, MD 21202
(410) 752-9700

*Counsel of Record

Counsel for Petitioner
Alston R. Keener

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Where a petroleum franchisor alleges, as an affirmative defense under the Petroleum Marketing Practices Act (PMPA), to have offered its franchisee a right of first refusal of a third party's bid to purchase the franchisee's "leased marketing premises," must the franchisor prove that the property offered to the franchisee was identical to that covered by the bid, a question as to which the courts of appeals are in conflict?

2. By judicially engrafting onto the PMPA a "strong presumption" of petroleum franchisor compliance, did the Fourth Circuit panel majority impermissibly reverse the express statutory presumption of franchisor noncompliance?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alston R. Keener respectfully prays that a writ of certiorari issue to review the judgment and opinion that the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 15, 1994.

OPINIONS BELOW

The Fourth Circuit's opinion, which affirmed the district court's grant of summary judgment dismissing Keener's claim against respondents (collectively "Exxon") under the Petroleum Marketing Practices Act (PMPA), and the dissenting opinion of Judge Murnaghan

are reported, *see Keener v. Exxon Co., USA*, 32 F.3d 127 (1994), and are reprinted in the appendix, *see* App. to Pet. for Cert. 1a-16a.

Keener filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. On September 23, 1994, the Fourth Circuit entered an order denying the petition for rehearing by a 2-1 vote and denying the suggestion for rehearing *en banc* by a 7-3 vote, with three judges not participating. The order denying Keener's petition for rehearing and suggestion for rehearing *en banc* has not been reported. It is reprinted in the appendix. *See* App. to Pet. for Cert. 25a-26a.

The opinion and order of the United States District Court for the District of Maryland granting Exxon's motion for summary judgment are not reported. The texts of the opinion and order are reprinted in the appendix. *See id.* 17a-24a.

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. §1254(1).

The Fourth Circuit entered its judgment on August 15, 1994. Thereafter, Keener filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. On September 23, 1994, the Fourth Circuit entered an order denying Keener's petition for rehearing and suggestion for rehearing *en banc*.

STATUTORY PROVISIONS INVOLVED

This case requires consideration of two provisions contained in Title I of the Petroleum Marketing Practices Act, 92 Stat. 322, 15 U.S.C. §§2801-2806.

Section 102(b)(3)(D) of the PMPA provides in pertinent part that a petroleum franchisor that has determined "in good faith and in the normal course of business" to sell a service station may refuse to renew the franchise relationship pertaining to the station so long as:

> "(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either –
>
> "(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or
>
> "(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. §2802(b)(3)(D)(iii).

Section 105(c) of the PMPA allocates the burdens applicable to an action arising under the PMPA:

> "In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title." 15 U.S.C. §2805(c).

STATEMENT

Factual History

In 1986, respondent Exxon built a service station on land it owned in Morgantown, West Virginia. Soon thereafter, petitioner Alston R. Keener entered into a franchise agreement with Exxon to operate the station, known as the Sabraton station.

The franchise agreement permitted Keener to purchase Exxon-brand gasoline from Exxon for resale to consumers at the station, which Keener leased from Exxon. Keener developed the station into a remarkably successful business that sold two million gallons of Exxon gasoline annually.

Exxon has several methods of distribution for its gasoline. One method involves Exxon's sale of gasoline to its franchised retail dealers, such as Keener. Another method involves Exxon's sale of gasoline to its franchised distributors, who resell the gasoline at wholesale to dealers and, in some instances, at retail to consumers.

In 1991, Exxon decided to auction off its best West Virginia stations to its distributors. Under its plan, Exxon hoped to obtain the best sale prices for its "key site" stations while retaining sufficient control over them to ensure that they would continue to sell Exxon-brand gasoline for at least twenty-one years. Exxon determined that the Sabraton station was a "long-term keeper," Exxon's highest classification of "key site." An appraisal completed for Exxon on July 13, 1991, estimated the station's fair market value to be $370,000.

On July 30, 1991, Exxon decided to sell the Sabraton station, with a gasoline supply commitment, to a distributor for not less than $547,000. *See* Fourth Circuit Appendix ("CA4 App.") 17. Under the PMPA, a commitment to supply refiner-trademarked gasoline is a franchise. *See* 15 U.S.C. §2801(1)(B)(ii)(I).

On August 29, 1991, Exxon solicited bids on the Sabraton station from six Exxon distributors, including Joe DeFazio Oil Company (DeFazio). Exxon informed the distributors that it demanded a twenty-one year option to repurchase the property.

On September 26, 1991, Exxon notified Keener that his franchise relationship with Exxon would not be renewed. The notice informed Keener that he would be given the opportunity to purchase the station, but that his right to purchase gasoline from Exxon would terminate.

On October 23, 1991, DeFazio bid $1,200,010. The bid was to remain open until February 20, 1992. *See* CA4 App. 18, 20-26.

On December 17, 1991, Exxon notified Keener that someone had bid $1,200,010 to purchase the station. The notice, which purported to offer a right of first refusal on the bid, informed Keener that he did not have to grant Exxon a repurchase option. The notice did not disclose, however, that by matching the bid Keener would receive only part of the package of items that was the subject of the bid. DeFazio's bid was for an Exxon-branded station and the right to purchase its gasoline requirements from Exxon at favorable "rack" prices, which Exxon offers to its distributors even when, as here, they purchase as retailers. Had Keener matched DeFazio's bid, Keener

would have received an unbranded station and a refusal by Exxon to sell him gasoline at any price.

Keener did not believe that Exxon's offer constituted a valid right of first refusal under section 102(b)(3)(D)(iii)(II) of the PMPA. *See* 15 U.S.C. §2802(b)(3)(D)(iii)(II). Because the PMPA entitled Keener to receive either a valid right of first refusal or a "bona fide offer to sell," *see id.* §2802(b)(3)(D)(iii), Keener asked Exxon to sell him the Sabraton station at its fair market value. Exxon refused, and Keener declined to purchase the station for $1.2 million.

Exxon's offer to Keener expired on February 15, 1992. Five days later, DeFazio's bid expired without acceptance by Exxon.

On June 30, 1992, Exxon authorized DeFazio to display the Exxon trademark at the Sabraton station "pending [DeFazio's] purchase . . . of the property. . . . " CA4 App. 42. At a date unknown to Keener, Exxon committed to supply DeFazio with approximately 1.7 million gallons of gasoline per year to meet the station's requirements. *See id.* 521-22. On July 13, 1992, Exxon offered to sell the station to DeFazio. *See id.* 138. The price for this entire package was $1,200,010.

On July 21, 1992, DeFazio accepted Exxon's offer of the station, the trademark, and the gasoline commitment, *i.e.*, the leased marketing premises and a PMPA franchise to operate it. *See id.* 144. In effect, DeFazio paid Exxon $1.2 million for a package consisting of Exxon's station and Keener's franchise. Of the $1.2 million received for the package, Exxon allocated all of the proceeds to the station.

Procedural History

On October 1, 1992, Keener filed a complaint in the Circuit Court of Monongalia County, West Virginia. The complaint alleged that Exxon had violated the PMPA by unlawfully refusing to renew its franchise relationship with Keener.

Under the PMPA, when a franchisor decides to sell a franchised property and not to renew the franchise relationship, the franchisor must either: (1) make "a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises"; or (2) offer "the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. §2802(b)(3)(D)(iii).

Here, it is undisputed that Exxon did not make "a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises." *Id.* Accordingly, the sole question presented in Keener's suit against Exxon was whether Exxon extended to Keener a valid right of first refusal.

Keener's theory was that a valid PMPA right of first refusal requires the franchisor to offer to sell the leased marketing premises (*i.e.*, the gas station) to its franchisee at the same price offered by a third party for the premises. Here, Exxon offered Keener the right to pay the same price bid by DeFazio, but DeFazio's bid covered more than the leased marketing premises. In exchange for $1.2 million, DeFazio received the gas station, an Exxon franchise, and the right to purchase Exxon-brand gasoline at favorable "rack" rates. In exchange for the same price,

Keener would have received only the gas station; Keener would not have received an Exxon franchise or the right to purchase Exxon-brand gasoline at any price.

The defendants removed this suit to the United States District Court for the Northern District of West Virginia, which exercised subject matter jurisdiction pursuant to 28 U.S.C. §1331. Thereafter, the suit was transferred to the United States District Court for the District of Maryland.

After the time for discovery had expired, Exxon moved for summary judgment. Keener filed a cross-motion for partial summary judgment against Exxon on the question of liability. At that time, the district court permitted Keener to dismiss all defendants other than Exxon.

On December 17, 1993, the district court granted Exxon's motion for summary judgment and denied Keener's cross-motion. *See* App. to Pet. for Cert. 17a-24a. The district court concluded either that DeFazio's offer to Exxon and Exxon's offer to Keener did not have to be the same or that no reasonable jury could have concluded that they were different.

Believing the district court's ruling to be erroneous, Keener filed an appeal from the final judgment to the Fourth Circuit. On June 6, 1994, Keener's appeal was argued before Circuit Judges Murnaghan, Wilkinson, and Wilkins. In an opinion issued August 15, 1994, Judge Wilkinson, writing for himself and Judge Wilkins, affirmed the judgment of the district court. In explaining the basis for its affirmance, the panel majority wrote:

> "Keener's challenge rests on the assertion that the property Exxon offered him somehow differed

> from what DeFazio Oil had offered to buy. The fact that Exxon offered Keener the service station at the same price DeFazio Oil had bid, however, creates the strong presumption that Exxon fulfilled its right of first refusal obligation under §2802(b)(3)(D)(iii)(II). This presumption that a same price offer evidences statutory compliance reflects the recognition that claims such as Keener's intrude upon normal business operations once filed. Indeed, Keener's suit, by calling into question DeFazio Oil's continued operation of the station, can only have made it more difficult for DeFazio to manage its business affairs. Such a result, of course, is disruptive of the market efficiency the PMPA sought to maintain. Accordingly, early resolution of claims is of special significance in the PMPA context, and a presumption of statutory compliance where Exxon offered the same station for the same price facilitates that end. The presumption also comports with the desire not to transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions. *See Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 377 (4th Cir. 1992) (per curiam). It remains only to determine whether Keener has made a sufficient showing to create a triable issue of fact in the face of that presumption." *Keener v. Exxon Co., USA*, 32 F.3d 127, 131 (CA4 1994); App. to Pet. for Cert. 8a-9a.

In applying the "strong presumption" of statutory compliance that it had just created, the Fourth Circuit panel majority acknowledged that Keener had pointed to evidence in the record that what DeFazio purchased for $1.2 million differed from what Keener had been offered in exchange for the same price. *See* 32 F.3d at 131; App. to Pet. for Cert. 9a. Nevertheless, the "strength" of the panel majority's judge-made presumption proved sufficient to

overcome both Keener's evidence of Exxon's statutory noncompliance and Congress's express statutory presumption, found in section 105(c) of the PMPA, 15 U.S.C. §2805(c), of petroleum franchisor noncompliance with the PMPA.

Judge Murnaghan dissented. Recognizing that a right of first refusal requires *both* the price *and* the other terms and conditions of the offer to be the same, Judge Murnaghan began his dissenting opinion by writing: "The sole issue on appeal is whether the terms of Exxon's offer to Keener were identical to the terms of DeFazio Oil's offer to Exxon." *Keener*, 32 F.3d at 133; App. to Pet. for Cert. 13a (Murnaghan, J., dissenting).

Observing that "Exxon bears the burden of going forward with evidence to establish that the terms of the two offers were identical," 32 F.3d at 133; App. to Pet. for Cert. 14a, Judge Murnaghan wrote:

> "Under the terms of DeFazio Oil's offer to Exxon, DeFazio Oil gave Exxon (1) $1.2 million, and (2) an option to repurchase the service station if it ceased to be used to sell Exxon-brand motor fuel at any time in the next twenty-one years. Exxon gave DeFazio Oil (1) the station, (2) the right to display Exxon's trademark at the station, and (3) the right to purchase a sufficient supply of Exxon-brand motor fuel, at the relatively low 'rack' price, to meet the station's needs (*i.e.*, approximately 1.7 million gallons of fuel per year).
>
> "The terms of Exxon's offer to Keener were much simpler: Keener would have to have given Exxon $1.2 million and Exxon would had to have given Keener the station. Clearly, the express terms of the two offers were *not* identical. As an example, the promise

of a sufficient supply of Exxon-brand motor fuel at the 'rack' price was not to be given.

"Furthermore, Exxon has pointed to nothing in the record to suggest that the value of the repurchase option equalled the sum of the values of the trademark agreement and the gasoline supply commitment. Indeed, there is evidence to the contrary. Purchasing from an Exxon distributor (who would himself first purchase at the 'rack' price) instead of from Exxon itself is obviously less advantageous since some additional profit would be due to the distributor. Thus, the Court has no basis for holding that the two offers were equivalent, either in their express language *or* in their economic worth. Therefore, I would vacate the grant of summary judgment and remand the case to the district court." 32 F.3d at 133; App. to Pet. for Cert. 14a-15a (emphasis in original).

Judge Murnaghan turned next to the "strong presumption" of statutory compliance that the majority created to shift the statutory burden from franchisor to franchisee:

"The majority avoids [reversal of the district court's judgment] by creating out of whole cloth a 'strong presumption' that, whenever two offers contain the same purchase price, a valid right of first refusal has been extended – regardless of whether the same items were being purchased at that price. The majority's 'strong presumption' finds no support in the plain language of the PMPA or in the case law interpreting that statute. Furthermore, it makes no sense to presume that an offer to buy several valuable property interests (*e.g.*, a station plus the right to use a trademark plus the right to distribute a supply of fuel) and an offer to buy only one of those interests

(*e.g.*, a station) are 'identical' merely because the dollar amounts contained in the bids are the same. Moreover, the majority's creation of the 'strong presumption' could undermine the very purpose of the PMPA – to protect relatively weak local franchisees from the unfair business practices of powerful and sophisticated oil companies. *See Barnes v. Gulf Oil Corp.*, 824 F.2d 300, 306 (4th Cir. 1987) ('[The PMPA] was *designed* to benefit the small retailer. . . . ' (emphasis in the original)); *id.* at 305 ('As remedial legislation, the [PMPA] must be given a liberal construction consistent with its goal of protecting franchisees.' (citation and internal quotation marks omitted)). Therefore, I respectfully dissent." 32 F.3d at 133-34; App. to Pet. for Cert. 15a-16a (footnote omitted).

Keener thereafter filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. In an order dated September 23, 1994, the panel denied Keener's petition for rehearing by a vote of 2-1, and the *en banc* court denied Keener's suggestion for rehearing *en banc* by a vote of 7-3, with three judges not participating. *See* App. to Pet. for Cert. 25a-26a. Circuit Judges Widener, Murnaghan, and Michael voted in favor of rehearing the case before the full court. *Id.* 26a.

REASONS FOR GRANTING THE WRIT

In the Petroleum Marketing Practices Act, Congress allowed an oil company not to renew the franchise applicable to a service station that the oil company intended to sell provided that the oil company first made a bona fide offer to sell the station to its franchisee or offered the

franchisee a right of first refusal of a third party's offer to purchase. *See* 15 U.S.C. §2802(b)(3)(D)(iii). Congress also expressly provided that once a franchisee proves the nonrenewal of its franchise, the burden is upon the oil company to establish as an affirmative defense that nonrenewal was permitted under the PMPA. *Id.* §2805(c).

In this case, the Fourth Circuit ruled, in conflict with the Second and Ninth Circuits, that the PMPA's obligation to extend a right of first refusal is presumptively satisfied so long as the price term of the offer to sell the premises to the franchisee is the same as the price term contained in a third party's bid, even where, as here, the third party's bid covers items in addition to the premises.

The Fourth Circuit's ruling creates a conflict among the circuits as to what constitutes a valid PMPA right of first refusal, a question of utmost importance to the thousands of petroleum franchisees who, because of the PMPA's preemption provision, must rely heavily on the PMPA to shield them from the unfair business practices of powerful and sophisticated oil companies. Furthermore, the Fourth Circuit's unprincipled presumption threatens to wreak havoc in the twenty-six other instances where Congress has granted rights of first refusal to various private parties, to State and local governments, to the federal government, and to the Chief Justice of the United States.

This Court should also grant review because the Fourth Circuit panel majority has judicially engrafted onto the PMPA a presumption of oil company compliance despite Congress's clear and express statutory presumption of oil company noncompliance. *See* 15 U.S.C.

§2805(c). The Fourth Circuit panel majority's ruling that the PMPA must be construed to maximize ease of application and to minimize intrusion into the affairs of oil companies is contrary to the manner in which other federal courts of appeals have ruled that the PMPA must be understood and applied.

Because, in accordance with the intent of Congress, the PMPA must be construed to provide real and uniform protection to petroleum franchisees throughout the nation, the Court should grant this petition to resolve the circuit conflict as to what constitutes a valid "right of first refusal" and to overturn the Fourth Circuit's "strong presumption" of franchisor compliance, which directly contradicts the express presumption of franchisor noncompliance that Congress enacted in 15 U.S.C. §2805(c).

I. The Fourth Circuit's "Strong Presumption" That A Right Of First Refusal Is Extended Anytime The Offering Prices Are The Same Creates A Circuit Split

In the decision below, the Fourth Circuit panel majority held: "The fact that Exxon offered Keener the service station at the same price DeFazio Oil had bid, however, creates the strong presumption that Exxon fulfilled its right of first refusal obligation under [15 U.S.C.] §2802(b)(3)(D)(iii)(II)." *Keener*, 32 F.3d at 131; App. to Pet. for Cert. 8a.

As a result of that "strong presumption," which no other court applying the PMPA has ever recognized, the Fourth Circuit panel majority was able to affirm the district court's grant of summary judgment in Exxon's favor

despite the fact that Keener had introduced evidence, as all three members of the Fourth Circuit panel acknowledged, *see* 32 F.3d at 131, 133; App. to Pet. for Cert. 9a, 14a-15a, showing that DeFazio's $1.2 million bid purchased items that Keener would not have received had he paid the same $1.2 million to Exxon.

The Fourth Circuit's ruling conflicts with the Ninth Circuit's ruling in *Ellis v. Mobil Oil*, 969 F.2d 784 (CA9 1992). In *Ellis*, the Ninth Circuit affirmed in relevant part a district court's ruling that "[a] right of first refusal requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the preemption *on terms identical to those the owner has received from another.*" *Ellis v. Mobil Oil Corp.*, 708 F. Supp. 1094, 1096 (Ariz. 1989) (emphasis added; internal quotations omitted).

The Ninth Circuit held in *Ellis* that where an oil company agrees to sell to a third party more than just the real property that was the subject of a franchise, the oil company is unable to employ the PMPA's right of first refusal provision. *Ellis*, 969 F.2d at 786. If Keener's case had arisen in the Ninth Circuit, that court, upon recognizing that DeFazio's offer covered more items than merely the premises that had been the subject of the franchise, would have concluded that Exxon failed to offer Keener a valid right of first refusal.

The Fourth Circuit's ruling also conflicts with that of the Second Circuit in *Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 870 F.2d 93 (CA2 1989) (per curiam), *aff'g* 699 F. Supp. 27 (E.D.N.Y. 1988). In the decision that the Second Circuit affirmed and adopted, the district

court ruled, construing 15 U.S.C. §2802(b)(3)(D)(iii)(II), that "[a] right of first refusal is a right to buy on the same terms offered by a third party." 699 F. Supp. at 31.

Thus, had Keener's case arisen in the Second Circuit, that court also would have held that Exxon did not afford him a right of first refusal under the PMPA, because the offer that DeFazio made to Exxon did not share the same terms as the offer that Exxon made to Keener.[1]

The "right of first refusal" guaranteed by the Second and Ninth Circuits, but not by the Fourth Circuit, is in accord with the ordinary meaning of the phrase "right of first refusal":

> "The holder of such a right has the option to purchase the grantor's real estate on the terms and conditions of sale contained in a bona fide offer by a third party to purchase such real estate, provided it is

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[1] The Fourth Circuit's ruling in *Keener* is also in conflict with the decisions of an Illinois federal district court and New York's intermediate appellate court. *See Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473, 475 (N.D. Ill. 1985) ("[t]he statute clearly requires Mobil to give plaintiff the right to *match* a third-party purchaser's offer") (emphasis in original); *Mobil Oil Corp. v. Baliko*, 192 A.D.2d 450, 450, 597 N.Y.S.2d 15, 16 (1st Dep't 1993) (mem.) (stating that oil company did not offer franchisee a valid PMPA right of first refusal where offer that oil company made to franchisee "added a term not present in the agreement between" the oil company and its prospective purchaser).

an offer that the grantor is otherwise willing to accept." Black's Law Dictionary 1325 (6th ed. 1990).[2]

While this case would be deserving of review even if its implications were limited to the PMPA, the Fourth Circuit's "strong presumption" of when a right of first refusal has been extended also threatens to erode the rights of first refusal that Congress provided in twenty-six other statutes to private parties, State and local governments, the federal government, and the Chief Justice of the United States.[3] In these statutes, Congress used the phrase "right of first refusal" to denote that the holder of the right is entitled not merely to the same price as a third party but also to purchase, in exchange for that price, the same items being purchased by the third party.

For example, in the Agricultural Credit Act of 1987, Congress expressly gave farmers a right of first refusal to purchase property that a financial institution acquired through foreclosure. *See* 12 U.S.C. §2219a. Section 2219a(b)(5)(A) of Title 12, United States Code, makes clear that a right of first refusal has two components: the purchase price, and the other terms and conditions of the sale. In order for a right of first refusal to be afforded under the Agricultural Credit Act, both components must be the same in both offers.

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[2] This Court has held that where Congress did not define a term used in a statute, the term must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 114 S. Ct. 996, 1001 (1994).

[3] In the appendix, Keener sets forth citations to and synopses of each of these twenty-six statutes. *See* App. to Pet. for Cert. 27a-31a.

Similarly, in 16 U.S.C. §460x-11(e)(3), Congress gave the Secretary of the Interior "a right of first refusal to match any bona fide offer to obtain such interest [in a particular piece of scenic land] under the same terms and conditions as are contained in such offer." In 20 U.S.C. §1132f-7(d), entitled "Right of first refusal to [Student Loan Marketing] Association," Congress gave the Student Loan Marketing Association a right of first refusal to purchase common stock owned by the Secretary of Education in a particular corporation "on the same terms and conditions as such securities are to be offered to other persons."

Congress's use of the phrase "right of first refusal" in these statutes, and in the others cited in the appendix, proves that Congress intended that *both* the price *and* the other terms and conditions of sale offered to the holder of the right be the same as the price and the other terms and conditions offered by or to a third party.

The Fourth Circuit's plainly incorrect construction of the phrase "right of first refusal" as employed in the PMPA, in conflict with the decisions of the Second and Ninth Circuits, will undermine not only the important protection granted to petroleum franchisees under that statute but will also undermine application of the twenty-six other statutory provisions in which Congress provided rights of first refusal. For these reasons, the Court should grant this petition for a writ of certiorari.

II. The "Strong Presumption" Of Oil Company Compliance With The PMPA That The Fourth Circuit Judicially Engrafted Onto The Statute Contradicts Congress's Express And Directly Opposite Presumption Of Oil Company Noncompliance

In Section 105(c) of the PMPA, Congress provided that a franchisee such as Keener need only show that his franchise was not renewed in order to establish a prima facie case that the oil company franchisor violated the PMPA. *See* 15 U.S.C. §2805(c). Once the franchisee has established a prima facie case, the burden shifts to the oil company "to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title. . . . " *Id.*[4]

As the First Circuit explained in *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1991):

> "Under the enforcement provision of the Act, a franchisee may maintain a civil action against a franchisor who fails to comply with the requirements of section 2802 or 2803. 15 U.S.C. §2805(a). '[I]n order to establish a claim under the PMPA, the plaintiffs must prove as a threshold matter a termination or nonrenewal of their franchise relationship within the meaning of the PMPA. 15 U.S.C. §2805(c).' *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 359 (D. Conn.) (granting defendants' motions for summary judgment

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[4] This Court has recognized as "well established" the rule that an affirmative defense is to be "pleaded and proved by the party attempting to rely on it . . . . " *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980); *see also Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 2255 (1994) ("The only time the burden of proof – as opposed to the burden to produce evidence – might shift is in the case of affirmative defenses.").

> because valid assignment did not constitute termination or nonrenewal of franchise), *aff'd*, 889 F.2d 1280 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1811 (1990). Once termination or nonrenewal has been established, the defendant franchisors 'then bear the burden of establishing as an affirmative defense that the termination or nonrenewal was permitted under the Act.' 726 F. Supp. at 359. *See also* 15 U.S.C. §2805(c)." *Id.* at 748.

Similarly, in *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1436 (CA10 1987), the Tenth Circuit, construing 15 U.S.C. §2805(c), explained: "In other words, in any PMPA action, including an action for an injunction, the franchisor bears the burden of establishing its compliance with the statute."[5]

Here, it is undisputed that Exxon decided not to renew Keener's franchise. Thus, it is undisputed that Keener established a prima facie case that Exxon violated

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[5] The decisions of the First and Tenth Circuits regarding allocation of the burdens of proof under the PMPA, but not the holding of the Fourth Circuit in *Keener*, are faithful both to the statutory language of §2805(c) and to the legislative history of the PMPA. *See* S. Rep. No. 731, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874 ("The provisions of title I are enforceable by private civil action in U.S. District Court. Money damages and injunctive relief are authorized. *The legislation places on the franchisor the burden of proving compliance with all statutory requirements.*") (emphasis added); *id.* at 41, *reprinted in* 1978 U.S.C.C.A.N. at 899 ("In any action authorized by section 105, the franchisee has the burden of proving the existence of a franchise, his status as a franchisee, and the termination of the franchise or the nonrenewal of the franchise relationship. *Thereafter, the burden is shifted to the franchisor to prove as an affirmative defense that the termination was permitted under section 102(b) or section 103.*") (emphasis added).

the PMPA. Under the statutory scheme enacted by Congress, the burden shifted to Exxon to establish as an affirmative defense that nonrenewal was permitted under section 2802(b). *See* 15 U.S.C. §2805(c).

In order for Exxon to establish as an affirmative defense that nonrenewal of Keener's franchise was permitted under section 2802(b), Exxon had to show that it extended to Keener a "right of first refusal," it being undisputed that Exxon never made to Keener a "bona fide offer to sell." *Id.* §2802(b)(3)(D)(iii). As Keener has shown, a valid right of first refusal requires that the same price and the same other terms and conditions contained in a third party's offer be extended to the holder of the right.

While Congress has thus placed the burden upon the oil company to establish that *both* the same price *and* the same other terms and conditions were offered to the holder of the right of first refusal, here the Fourth Circuit panel majority has reversed Congress's placement of one of those burdens. Under the Fourth Circuit's holding, once an oil company shows that the purchase price offered by a third party was the same purchase price offered to the holder of the right of first refusal, the burden then shifts to the former franchisee – despite clear statutory language to the contrary – to establish that the third party is purchasing a package of items different from that being offered to the former franchisee.[6]

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[6] Obviously, the same price is a necessary, but not a sufficient, condition of having a right of first refusal. The mere fact that the prices are identical suggests neither that the items offered for sale are also identical nor that they are different. All

The reasons the Fourth Circuit panel majority gave for judicially vitiating Congress's express presumption of oil company noncompliance with the PMPA and substituting a directly opposite presumption of oil company compliance, *see Keener*, 32 F.3d at 131; App. to Pet. for Cert. 8a, were that claims under the PMPA "intrude upon normal business operations" and are "disruptive of the market efficiency the PMPA sought to maintain," *see id.*

As Judge Murnaghan's dissent and the decisions of numerous other federal courts of appeals make clear, however, Congress intended the PMPA to benefit franchisees, not oil company franchisors. If, as the Fourth Circuit panel majority appeared to believe, Congress went too far in favoring the interests of franchisees, the proper remedy lies with Congress, not in the judicial nullification of Congress's legislation.

The Third Circuit, in *Slatky v. Amoco Oil Co.*, 830 F.2d 476 (1987) (in banc), rejected the very same "need for ease of administration" argument that the Fourth Circuit accepted here. In an opinion by Judge Becker that

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that the fact of same price shows is the existence of an element common both to valid rights of first refusal and to invalid price manipulations.

As the Fourth Circuit itself once recognized, "allocations of price to elements of a package may readily be manipulated *to defeat* contractual rights of first refusal. It is easy to imagine an unreasonably inflated value assigned to the subject of any first-refusal option." *Pantry Pride Enters., Inc. v. Stop & Shop Cos.*, 806 F.2d 1227, 1231-32 (1986) (emphasis in original). The presumption adopted by the Fourth Circuit panel majority in *Keener* permits oil companies such as Exxon to defeat congressionally conferred rights of first refusal by engaging in the very type of price manipulation condemned in *Pantry Pride*.

referred to Amoco Oil Company and other oil companies as "distributors," the Third Circuit explained in *Slatky* that:

> "the very act of passing the PMPA indicated Congress's rejection of the view advanced by the major gasoline retailers that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony. *See, e.g., Senate Hearings, supra,* at 319-22 (statement of Kenneth E. Curtis, Vice-President of Marketing for Amoco). While a subjective good faith standard would probably enable distributors to pursue their own, unfettered self-interest, the statute does not generally guarantee distributors that right. We therefore reject this goal as a guiding principle for interpreting the bona fide offer provision." *Id.* at 483.

Similarly, in *Hilo v. Exxon Corp.*, 997 F.2d 641 (CA9 1993) (O'Scannlain, J.), the Ninth Circuit explained:

> "Our general approach to the construction and application of the PMPA is well established. As we recently observed, 'the overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship.' *Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992) (quoting *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 484 (3d Cir. 1987)). In addition, '[a]s remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees.' *Humbolt Oil Co. v. Exxon Co., U.S.A.*, 695 F.2d 386, 389 (9th Cir. 1982) (citation omitted)." *Id.* at 643.[7]

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[7] *See also Brach v. Amoco Oil Co.*, 677 F.2d 1213 (CA7 1982): "The statutory scheme of the PMPA seeks to strike a balance between the interests of the participants in a petroleum

From the outset, judicial interpretation of the PMPA has been marred by "conflict and diversity." *See, e.g.*, Lorin M. Kleeger, Comment, *Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity*, 32 Emory L.J. 273, 274 (1983) ("judicial construction of the PMPA has defeated congressional intent").

Here, the Fourth Circuit has created a circuit split on the meaning of what constitutes a valid "right of first refusal" under the PMPA. The Fourth Circuit has also engrafted onto the PMPA a strong judicial presumption of oil company compliance despite Congress's express presumption in 15 U.S.C. §2805(c) of oil company noncompliance.

The Fourth Circuit's decision involves a matter of utmost importance to thousands of petroleum franchisees, and to other holders of statutory rights of first refusal, as to which the courts of appeals are in disagreement. The Fourth Circuit's decision also provides an opportunity for this Court to explain that where Congress has expressly established a presumption, a court may not override Congress and establish – through an unprincipled act of judicial legislation – a directly contrary presumption.

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marketing franchise relationship. Congress recognized the disparity of bargaining power between franchisor and franchisee and the harsh consequences of suddenly terminating a business for which the franchisee has worked long and hard to develop goodwill." *Id.* at 1220.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS M. WILSON, III*
LYNN A. KOHEN
TYDINGS & ROSENBERG
100 East Pratt Street
Baltimore, MD 21202
(410) 752-9700

*Counsel of Record

HOWARD J. BASHMAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS
Three Parkway – 20th Floor
Philadelphia, PA 19102
(215) 665-7200

PAUL CRANSTON
7000 Hampton Center, Suite I
Morgantown, WV 26505
(304) 599-8787

Counsel for Petitioner
Alston R. Keener

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALSTON R. KEENER, *Plaintiff-Appellant,* v. EXXON COMPANY, USA, a foreign corporation; EXXON CORPORATION, a foreign corporation, *Defendants-Appellees,* and ALAN ENTERPRIZES, a West Virginia Limited Liability Company; JOE DEFAZIO OIL COMPANY, a West Virginia Corporation; JOSEPH A. DEFAZIO, individually and as organizing partner number one of Alan Enterprizes, a West Virginia Limited Liability Company; JOSEPH DEFAZIO, individually and as organizing partner number two of Alan Enterprizes, a West Virginia Limited Liability Company, *Defendants.*	No. 94-1142

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge.
(CA-92-95)

Argued: June 6, 1994

Decided: August 15, 1994

Before MURNAGHAN, WILKINSON, and WILKINS, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the majority opinion, in which Judge Wilkins joined. Judge Murnaghan wrote a dissenting opinion.

COUNSEL

ARGUED: Thomas Matthew Wilson, III, TYDINGS & ROSENBERG, Baltimore, Maryland, for Appellant. Gaspare Joseph Bono, HOWREY & SIMON, Washington, D.C., for Appellees. **ON BRIEF:** Lynn A. Kohen, TYDINGS & ROSENBERG, Baltimore, Maryland; Paul Cranston, Morgantown, West Virginia, for Appellant. Robert G. Abrams, Robert E. Leidenheimer, Jr., HOWREY & SIMON, Washington, D.C., for Appellees.

OPINION

WILKINSON, Circuit Judge:

The question in this case is whether a gasoline station franchisee had an opportunity to exercise a valid right of first refusal as established by the Petroleum Marketing Practices Act ("PMPA"). *See* 15 U.S.C. §§ 2801-2806. Under the Act, a franchisor desiring to sell a station operated by a franchisee must either make a bona fide offer of sale to the franchisee or give the franchisee an opportunity to buy the station on the same terms as a third party offer. *See* 15 U.S.C. § 2802(b)(3)(D)(iii). Here, the franchisor pursued the second route and offered the

franchisee the station at the same price bid by a third party. This fact creates a strong presumption that a valid right of first refusal was extended. Because plaintiff's evidence is insufficient to overcome that presumption, we affirm the district court's decision that the franchisor complied with the PMPA's right of first refusal provision.

I.

In 1984, Exxon began construction of a service station in Morgantown, West Virginia. After the station was completed, it was leased to Alston Keener as Exxon's dealer-franchisee. Under the agreement with Exxon, Keener paid monthly rent and the costs of the gasoline he purchased from Exxon. The franchise was a profitable one, and the two parties signed a lease renewal in November 1988. The new lease was scheduled to run until March 1, 1992.

In 1991, Exxon began considering ways to improve the efficiency of its gasoline supply system. As part of that plan, Exxon decided it would phase out the use of dealer-operated stations in certain markets and sell those station sites to Exxon's independent distributors.[1] One of the markets selected for the new system included the Morgantown area. Exxon determined that part of the new strategy required sale of the station leased by Keener. It thus notified Keener on September 26, 1991 that his lease would not be renewed.

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[1] Before the new policy, stations such as Keener's were apparently supplied either by an independent Exxon-brand distributor that purchased gasoline from Exxon and delivered it to the station site, or on a direct-service basis by Exxon itself.

Exxon, following the procedures it had established for the sale of stations, solicited bids for the purchase of Keener's station from six Exxon-brand distributors in the region. The solicitations informed bidders that the minimum acceptable price was $547,000 and that Exxon would require an option to repurchase the station if the site ceased selling Exxon-brand gasoline at any time over the next twenty-one years. Three distributors ultimately bid on the station, with the high bid of $1,200,010 coming from Joe DeFazio Oil Company. Keener was notified of this bid on December 17, 1991, and offered a right of first refusal pursuant to 15 U.S.C. § 2802(b)(3)(D)(iii)(II). Exxon explained that Keener would have sixty days to purchase the station at the same price as DeFazio had bid. Exxon also told Keener that he would not be required to provide Exxon with the option agreement.

Keener then began negotiations with several other Exxon distributors in the area to determine whether they would provide him with Exxon products should he decide to purchase the station. Both Clements Oil Company and Hess Oil Company offered to sell Keener Exxon gasoline. However, Keener did not choose to match DeFazio's price. Instead, Keener asked Exxon to sell him the station at its "fair market value." Exxon declined, and sold the station premises to DeFazio.

Keener subsequently filed suit in West Virginia state court. The suit was removed to federal district court in West Virginia and then transferred with the parties' consent to federal district court in Maryland. Keener contended that the right of first refusal contained in 15 U.S.C. § 2802(b)(3)(D)(iii)(II) of the PMPA meant that he was entitled to buy the same thing DeFazio Oil bid on at

the same price DeFazio Oil offered. Exxon had not honored that entitlement, he claimed, because DeFazio Oil had bid on the station with the extra advantage of Exxon's promise to provide DeFazio Oil with a supply of gasoline. Because he was not actually being offered the same thing DeFazio Oil had bid on, Keener claimed, Exxon's actions violated the PMPA. Keener therefore requested that the court either (1) order DeFazio Oil to transfer the station to Keener for the asserted "fair market value" of $547,000, or (2) find Exxon liable for $653,010, the difference between $547,000 and the price DeFazio paid.

The district court rejected Keener's argument and granted summary judgment for Exxon. Contrary to Keener's claim, the district court found that he had, in fact, been offered the opportunity to purchase Exxon's interest in the property on the same terms as DeFazio. Indeed, the court concluded that because Keener did not have to provide Exxon with the repurchase option, "[t]he deal offered to Keener was thus more advantageous" than that offered to other bidders. The district court also noted that Keener could have continued to operate the premises as an Exxon station if he had matched the DeFazio Oil offer and then bought gasoline from an Exxon distributor. Once Keener declined to exercise his right to match the DeFazio Oil bid, the district court concluded, Exxon acted appropriately under the PMPA in selling the station to DeFazio.

Keener now appeals.

II.

The PMPA itself contains no statement of legislative purpose, but the background of its passage has left that purpose clear. There was much concern expressed that franchisors had used the threat of franchise termination to impose harsh conditions upon the business operations of franchisees. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 17-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 875-77. The Act did not create absolute protection for franchises, however; it established only "minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." 1978 U.S.C.C.A.N. at 873; *see Tobias v. Shell Oil Co.*, 782 F.2d 1172, 1174 (4th Cir. 1986).

The establishment of only minimal standards was motivated in part by the desire to limit federal intrusion into the property rights of the franchisor. *See Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986). Similarly, the Act intended to preserve the "flexibility" of petroleum delivery markets. 1978 U.S.C.C.A.N. at 877; *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 486-87 (3d Cir. 1987); *Radecki v. Amoco Oil Co.*, 634 F. Supp. 1393, 1401 (D. Minn. 1986). Congress understood that an industry driven by national and international market forces faces rapidly changing conditions. Such market uncertainties underscored the need for the petroleum industry to retain maximum economic efficiency in all areas, including the delivery of gasoline to individual consumers. *See* 1978 U.S.C.C.A.N. at 877 (noting the importance of preserving

franchisor ability to respond to "changing market conditions"); *see also May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989).

The PMPA preserves the flexibility of petroleum delivery markets by ensuring that sound business judgment does not become a casualty of constant judicial oversight. *See Valentine*, 789 F.2d at 1392 n.7. Section 2802(b)(3)(D)(iii), the provision at issue here, demonstrates the point. Once a franchisor makes the determination not to renew a franchise and sell the franchise station, the franchisor has two options. It may either make the franchisee a "bona fide offer to sell" the station, or it may provide the franchisee with a "right of first refusal" at a price offered by a third party buyer.[2] Providing the franchisor this choice demonstrates the statute's flexibility; more importantly, both options included in § 2802(b)(3)(D)(iii) fully reserve the price determining function to market actors.

III.

In the case before us, Exxon made a business judgment that its distributors were in the best position to

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[2] Specifically, the franchisor must have either:

> (I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or
>
> (II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

15 U.S.C. § 2802(b)(3)(D)(iii).

efficiently deliver company products to the consumer, and the value of the station was determined by competitive bidding among those distributors. Keener, of course, did not disappear from the picture: once DeFazio extended the $1,200,010 bid, Exxon gave Keener the opportunity to purchase the station at that price. *See* 15 U.S.C. § 2802(b)(3)(D)(iii)(II). Instead of exercising this right of first refusal, Keener chose to challenge the propriety of Exxon's actions through litigation.

Keener's challenge rests on the assertion that the property Exxon offered him somehow differed from what DeFazio Oil had offered to buy. The fact that Exxon offered Keener the service station at the same price DeFazio Oil had bid, however, creates the strong presumption that Exxon fulfilled its right of first refusal obligation under § 2802(b)(3)(D)(iii)(II). This presumption that a same price offer evidences statutory compliance reflects the recognition that claims such as Keener's intrude upon normal business operations once filed. Indeed, Keener's suit, by calling into question DeFazio Oil's continued operation of the station, can only have made it more difficult for DeFazio to manage its business affairs. Such a result, of course, is disruptive of the market efficiency the PMPA sought to maintain. Accordingly, early resolution of claims is of special significance in the PMPA context, and a presumption of statutory compliance where Exxon offered the same station for the same price facilitates that end. The presumption also comports with the desire not to transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions. *See Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 377 (4th

Cir. 1992) (per curiam). It remains only to determine whether Keener has made a sufficient showing to create a triable issue of fact in the face of that presumption.[3]

IV.

A.

Keener asserts that Exxon sold DeFazio Oil both a gasoline supply commitment and the station proper, whereas Exxon offered him only the opportunity to buy the station. This position finds only minimal support in the record. There is, of course, evidence that Exxon planned to, and ultimately did, increase the gasoline supply to the distributor who purchased the station. This evidence does not mean, however, that the purchase of the station entitled DeFazio Oil to the increased allotment. DeFazio Oil still had to apply separately for the

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[3] The dissenting opinion argues that the foregoing presumption is one that is created out of "whole cloth," and one that bears no relation to the purposes of the statute. To the contrary, the presumption is directly tied to the statutory requirement that a right of first refusal be extended. As a matter of basic logic, a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by a third party. Moreover, a presumption is often necessary to afford guidance to district courts in the course of the summary judgment process and to prevent a straightforward statutory requirement from becoming a litigious quagmire. Courts have routinely structured statutory proof schemes through the mechanism of presumptions. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The dissent's approach, by contrast, would leave litigants and district courts at sea.

increased allotment to supply the station.[4] If its distributorship were terminated, its right to purchase gasoline from Exxon for the station would end. In this respect, DeFazio's position bore a substantial similarity to that of Keener. Keener had every opportunity to assure a similar allotment of Exxon gasoline for himself by signing a contract with one of two Exxon distributors that offered to supply him if he purchased the station. Whatever points Keener wishes to make with respect to DeFazio's relationship with Exxon are thus significantly blunted by his own ability to secure supplies of Exxon gasoline.

Keener's real complaint is that DeFazio Oil had some sort of unfair advantage in the bargaining process by being able to deal directly with Exxon. Whatever advantage DeFazio Oil may have had, however, resulted from its preexisting distributor relationship with Exxon, not from the contract for sale of the station. Because DeFazio Oil already routinely purchased and distributed Exxon gasoline in the region, it was a relatively simple matter for the company to expand its existing distribution contract requirements with Exxon to accommodate the increased gasoline supply it would need to operate the station. Such advantages are in no sense impermissible; the PMPA does not prohibit the sale of stations to distributors, and federal courts are not in the business of equalizing all advantages on the market's playing field. It also

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[4] Keener contends that this point is irrelevant because the DeFazio Oil bid was not finalized into an actual sale until after the increased allotment had been approved. This contention still provides no indication that the station sales contract in itself guaranteed DeFazio Oil a supply of Exxon gasoline.

should not be forgotten that DeFazio's position as a distributor caused him some harm as well. It is undisputed that Keener did not have to provide Exxon with the repurchase option that all the distributors bidding on the station were required to accept. As a result, Keener had the advantage of being offered the station unencumbered by any contractual restrictions. The point here is that bidders routinely come to the table with different hands, and Keener can make no claim based on the fact that DeFazio Oil's preexisting commercial relationships gave it certain advantages in setting up an Exxon franchise at the station site.

B.

Keener also argues that the price DeFazio Oil paid demonstrates that more than just the station was at stake. He notes that Exxon initially appraised the station at $370,000 and ultimately approved a minimum sale price of $547,000. From these facts, Keener concludes that $547,000 is the value of the station alone, and argues that the discrepancy between this figure and the $1,200,010 DeFazio Oil paid can only be explained by the fact that DeFazio also purchased a guaranteed supply of Exxon gasoline.

This position suffers from several infirmities. To begin with, Keener downplays the fact $547,000 was simply the minimum acceptable price Exxon set for the station. This price thus represents nothing more than a floor on the bidding process. It is not necessarily Exxon's valuation of what it believed the station was likely to bring on the market.

More importantly, Keener's position reflects the belief that fair market value can most accurately be calculated in the abstract. However, fair market value is, by necessity, best set by the market itself. An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative. *See Amerada Hess Corp. v. Commissioner of Internal Revenue*, 517 F.2d 75, 83 (3d Cir. 1975). Here, the only such agreed upon price was the $1,200,010 bid that DeFazio Oil made. That price is a measure of what the station was worth to a distributor in DeFazio's position.[5] The fact that a final bid turns out to be higher than the level at which the bidding opens is not just endemic to the bidding process, but the commercially reasonable hope of every offeror. As a PMPA offeror, Exxon was entitled to seek the best purchase price that it could find for its property. The fact that it received such a price does nothing to strengthen plaintiff's case.

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[5] Because of its distributorship, DeFazio was able to purchase gasoline at the "rack" price. This price advantage most likely made it possible for DeFazio to bid a higher amount and still turn a profit operating what all admit was a high volume station. The $1,200,010 payment may, therefore, be termed the fair market value of the station. Indeed, when a third party makes an offer in cash, or its equivalent, for an item, a "court can justifiably infer that the amount of an arms' length offer represents the value of the station." *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992).

V.

Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision. This conclusion is strengthened by the fact that Keener has never sought a form of relief consonant with his stated injury. He has never offered to match DeFazio's bid. Instead, Keener has sought a court order mandating the transfer of the station to him for the $547,000 price floor set by Exxon, or damages based on the difference between the $547,000 price and the price DeFazio bid. Both these remedies would allow Keener to capture an unacceptable windfall based on an erroneous fair market valuation. *See Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473, 476 (N.D. Ill. 1985). We cannot accept the view that the protection of franchisees under the PMPA requires any such bonanza, particularly where the franchisor has done nothing more than get the best value it could for its property.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

The sole issue on appeal is whether the terms of Exxon's offer to Keener were identical to the terms of DeFazio Oil's offer to Exxon. *See Razavi v. Amoco Oil Co.*, 833 Supp. 1, 8 (D.D.C. 1993) (stating that the "right of first refusal" provision of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2802(b)(3)(D)(iii)(II), obliges a franchisor to offer to sell its gasoline station to the franchisee "on terms *identical* to those the [franchisor] has

received from another" (emphasis added)); *Ellis v. Mobil Oil Corp.*, 708 F. Supp. 1094, 1096 (D. Ariz. 1989) (same), *aff'd in relevant part*, 969 F.2d 784 (9th Cir. 1992); *see also Atlantic Ave. Oil & Gas Ltd. v. Texaco Ref. & Mktg., Inc.*, 699 F. Supp. 27, 31 (E.D.N.Y. 1988) ("A right of first refusal is a right to buy *on the same terms* offered by a third party." (emphasis added)), *aff'd*, 870 F.2d 93 (2d Cir. 1989).

On appeal from the entry of summary judgment, we must construe the terms of the offers by viewing all of the record evidence, and all reasonable inferences that may be drawn therefrom, in the light most favorable to Keener, the party opposing summary judgment. *See Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). As the franchisor, Exxon bears the burden of going forward with evidence to establish that the terms of the two offers were identical. *See* 15 U.S.C. § 2805(c).

Under the terms of DeFazio Oil's offer to Exxon, DeFazio Oil gave Exxon (1) $1.2 million, and (2) an option to repurchase the service station if it ceased to be used to sell Exxon-brand motor fuel at any time in the next twenty-one years. Exxon gave DeFazio Oil (1) the station, (2) the right to display Exxon's trademark at the station, and (3) the right to purchase a sufficient supply of Exxon-brand motor fuel, at the relatively low "rack" price, to meet the station's needs (*i.e.*, approximately 1.7 million gallons of fuel per year).

The terms of Exxon's offer to Keener were much simpler: Keener would have to have given Exxon $1.2 million and Exxon would had to have given Keener the station. Clearly, the express terms of the two offers were *not* identical. As an example, the promise of a sufficient

supply of Exxon-brand motor fuel at the "rack" price was not to be given.

Furthermore, Exxon has pointed to nothing in the record to suggest that the value of the repurchase option equalled the sum of the values of the trademark agreement and the gasoline supply commitment. Indeed, there is evidence to the contrary. Purchasing from an Exxon distributor (who would himself first purchase at the "rack" price) instead of from Exxon itself is obviously less advantageous since some additional profit would be due to the distributor. Thus, the Court has no basis for holding that the two offers were equivalent, either in their express language *or* in their economic worth. Therefore, I would vacate the grant of summary judgment and remand the case to the district court.

The majority avoids that result by creating out of whole cloth a "strong presumption" that, whenever two offers contain the same purchase price, a valid right of first refusal has been extended – regardless of whether the same items were being purchased at that price. The majority's "strong presumption" finds no support in the plain language of the PMPA or in the case law interpreting that statute. Furthermore, it makes no sense to presume that an offer to buy several valuable property interests (*e.g.*, a station plus the right to use a trademark plus the right to distribute a supply of fuel) and an offer to buy only one of those interests (*e.g.*, a station) are "identical" merely because the dollar amounts contained in the bids are the same. Moreover, the majority's creation of the "strong presumption" could undermine the very purpose of the PMPA – to protect relatively weak local franchisees from the unfair business practices of powerful

and sophisticated oil companies. *See Barnes v. Gulf Oil Corp.*, [824] F.2d 300, 306 (4th Cir. 1987) ("[The PMPA] was *designed* to benefit the small retailer. . . . " (emphasis in the original)); *id.* at 305 ("As remedial legislation, the [PMPA] must be given a liberal construction consistent with its goal of protecting franchisees." (citation and internal quotation marks omitted)).* Therefore, I respectfully dissent.

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*I recognize that the hard task of interpreting statutes can, in some cases, be aided by the application of judicially-created presumptions. *See generally* J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U.L. Rev. 907 (1992). In my view, however, this is not a proper case in which to apply such a presumption.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALSTON R. KEENER	*	CIVIL NO.
	*	92-0095-C (W. Va.)
v.	*	
EXXON COMPANY,	*	
U.S.A., et al.	*	

Thomas M. Wilson, III, Esquire, Baltimore, Maryland, Lynn A. Zaben, Esquire, Baltimore, Maryland, and Paul R. Cranston, Esquire, Morgantown, West Virginia, counsel for Plaintiff.

Gaspare J. Bono, Esquire, Washington, D.C., Robert G. Abrams, Esquire, Washington, D.C., Robert E. Leidenheimer, Jr., Esquire, Washington, D.C., and Paul E. Frampton, Esquire, Morgantown, West Virginia, counsel for Defendants Exxon company, U.S.A. and Exxon Corporation.

Mark D. Shepard, Esquire, Pittsburgh, Pennsylvania, and Woodrow A. Potesta, Esquire, Fairmont, West Virginia, counsel for Defendants Alan Enterprizes, Joe DeFazio Oil Company, Joseph A. DeFazio and Joseph DeFazio.

YOUNG, Joseph H., Senior United States District Judge

Date: December 17, 1993

MEMORANDUM

This case was transferred to the United States District Court for the District of Maryland from the Northern District of West Virginia. Defendants Exxon Company,

U.S.A. and Exxon Corporation ("Exxon"), Alan Enterprizes, Joe DeFazio Oil Company, Joseph A. DeFazio, and Joseph DeFazio ("DeFazio") seek Summary Judgment against Plaintiff Alston Keener ("Keener"), a former franchisee of Exxon. Keener has cross-filed for Partial Summary Judgment against defendants.

OPINION

I.

In 1984, Exxon purchased a parcel of land and built a service station in Morgantown, West Virginia. Keener leased the station from Exxon, paying a monthly rent and purchasing a high volume of Exxon products. On November 10, 1988, Keener and Exxon renewed their franchise agreement for a three-year period beginning February 13, 1989 and ending March 1, 1992.

In 1991 Exxon decided to shift from dealer-based to distributor-based operations in certain markets, including the area served by Keener's station. By letter dated September 26, 1991, Exxon notified Keener that it would not renew the franchise agreement, but agreed to extend the existing franchise to October 1, 1992. Exxon also informed Keener that he would be given an opportunity to purchase the station premises.

Exxon requested six of its distributors to submit bids for the premises, on the condition that the bids be not less than $547,000, the appraised value of the property. Exxon also required the bidders to agree to grant it an option to repurchase the station if at any time during the next

twenty-one years Exxon products were no longer offered for sale at the station.[1]

DeFazio, an Exxon distributor since 1956, submitted the highest bid of $1,200,010 for the station premises, including the land, building, and equipment. By letter dated December 17, 1991, Exxon offered Keener a sixty-day right of first refusal to buy the station for $1,200,010 pursuant to 15 U.S.C. § 2802(b)(3)(D)(iii)(II) of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. However, Exxon did not require Keener to grant it an option to repurchase the property if Exxon products were not sold at the station within twenty-one years of the sale.

Keener would have had to enter into a separate agreement with an Exxon distributor to operate the premises as an Exxon station. He negotiated with at least two distributors: Clements Oil Company, Inc. ("Clements") and Hess Oil Company, Inc. ("Hess"). Clements and Hess agreed to supply Exxon fuel and products to Keener if he purchased the station. Hess agreed to sell Keener Exxon fuel at a lower price than DeFazio.[2] Keener did not exercise the right of first refusal granted by Exxon.

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[1] Exxon also retained the right to repurchase the property if (1) Exxon decided that changes in the law posed too great a risk for continued ownership and operation by an Exxon-branded distributor; (2) at any time during the last eleven years of the twenty-one year period the station failed to meet Exxon's "retail image design standard"; or (3) anyone other than another Exxon distributor offered to purchase the property.

[2] These supply agreements are not before this Court.

Instead, Keener sought a franchise arrangement with DeFazio. When those negotiations did not produce an agreement,[3] Keener filed a Notice of Lis Pendis [sic] with the Clerk of the Circuit Court of Monongalia County, West Virginia on October 1, 1992, to notify the defendants that he claimed an interest in the property. The sale to DeFazio was completed on October 2, 1992.

II.

Summary judgment is appropriate only after adequate time for discovery and if there are no genuine issues of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must not weigh the evidence and determine the truth, but must resolve all reasonable inferences and questions of law in the nonmoving party's favor. *Id.* at 255; *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

Exxon argues that summary judgment is appropriate because it complied with the provisions of the PMPA when it decided to terminate Keener's franchise and sell the station. A franchisor may refuse to renew a franchise if, after a good faith determination in the normal course of business, the franchisor either:

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[3] DeFazio notified Keener on September 24, 1992 that it would not lease the property to Keener, and that the premises should be vacated on October 1, 1992.

> (I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises; or
>
> (II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

15 U.S.C. § 2802(b)(3)(D)(iii). Thus, Exxon had a choice of making Keener a bona fide offer to sell the premises or of offering Keener a right of first refusal at DeFazio's bid. When Exxon decided to sell the station and DeFazio submitted the highest of six bids, Keener had a right of first refusal. *See Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992) (§ 2802(b)(3)(D)(iii)(II) is applicable when the franchisor decides to sell the premises and a third party offers to purchase it); *Atlantic Ave. Oil & Gas v. Texaco Refining*, 699 F. Supp. 27, 29 (E.D. N.Y. 1988), *aff'd*, 870 F.2d 93 (2d Cir. 1989) (same).

Keener argues that the right of first refusal was inadequate because Exxon's offer to him was not identical to that offered to DeFazio. The right of first refusal must provide the franchisee with the opportunity to purchase the "franchisor's interest" in the property, § 2802(b)(3)(D)(iii); *see Atlantic*, 699 F. Supp. at 30; *Greco v. Mobil Oil Corp.*, 597 F. Supp. 468, 473 (N.D. Ill. 1984), and on the same terms as offered by the third party. *Atlantic*, 699 F. Supp. at 31.

Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio. Indeed, Keener was not required to provide Exxon with an option to repurchase the station if Exxon-brand fuel was not

offered for sale at the station during the first twenty-one years after the sale; whereas, DeFazio was required to grant Exxon such an option. The deal offered to Keener was thus more advantageous to Keener and complied with the above provisions of the PMPA.

Keener also argues that Exxon violated the meaning of the PMPA by terminating his franchise and offering to sell the station to other franchisees. He contends that such an arrangement made it impossible for him to match the highest bid. There is nothing in the language of the PMPA suggesting that such an argument is meritorious. *See May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989) (the Act should "not be interpreted to reach beyond its original language").

Keener's position is also contrary to the PMPA's purpose. Congress enacted the PMPA to protect "franchisees from arbitrary or discriminatory termination or nonrenewal of their franchises." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15 (S. Rep.), reprinted in 1978 U.S. Code Cong. & Ad. News 873, 874. The statute sought to remedy the problems that resulted from the disparity of bargaining power between franchisor and franchisee, and to effectuate the franchisee's reasonable expectation that the franchise relationship would be a continuing one. S. Rep. at 17-8, reprinted in 1978 USCAAN [sic] at 876. However, Congress also intended to allow franchisors adequate flexibility to "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. at 19, reprinted in 1978 USCAAN [sic] at 877. During a period of economic instability, petroleum firms must retain flexibility to improve efficiency through restructuring.

Further, the undisputed evidence shows that Keener could have operated the station as an Exxon station, though not as an Exxon franchisee himself, for at least the same costs he incurred as a franchisee. He could have, and in fact attempted, to enter into an arrangement with different Exxon distributors, including DeFazio, to buy Exxon products from a distributor rather than direct from Exxon. However, Keener elected not to exercise his right of first refusal and not to match the highest bid for the station. The cancellation of his franchise agreement was irrelevant to his inability to match DeFazio's $1.2 million purchase price.

III.

Keener received a legitimate right of refusal under § 2802(b)(3)(D)(iii)(II), which he elected not to exercise and, therefore, no factual issues are in dispute and Exxon is entitled to summary judgment as a matter of law.

/s/ Joseph H. Young
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALSTON R. KEENER	*	
	*	CIVIL NO.
v.	*	92-0095-C (W. Va.)
EXXON COMPANY, U.S.A., et al.	*	

ORDER

In accordance with the attached Memorandum it is this 17th day of December, 1993, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendants' Motion for Summary Judgment BE, and the same IS, hereby GRANTED; and

2. That Plaintiff's Cross Motion for Partial Summary Judgment BE, and the same IS, hereby DENIED;

3. That the judgment BE, and the same IS, hereby entered in favor of Defendants; and

4. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Filed September 23, 1994)

No. 94-1142
CA-92-95

ALSTON R. KEENER

Plaintiff-Appellant

v.

EXXON COMPANY, USA, a foreign corporation; EXXON CORPORATION, a foreign corporation

Defendants-Appellees

and

ALAN ENTERPRIZES, a West Virginia Limited Liability Company; JOE DEFAZIO OIL COMPANY, a West Virginia Corporation; JOSEPH A. DEFAZIO, individually and as organizing partner number one of Alan Enterprizes, a West Virginia Limited Liability Company; JOSEPH DEFAZIO, individually and as organizing partner number two of Alan Enterprizes, a West Virginia Limited Liability Company

Defendants

ORDER

Appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

The panel considered the petition for rehearing and is of the opinion that it should be denied. Judges Wilkinson and Wilkins voted to deny rehearing. Judge Murnaghan voted to grant rehearing.

In a requested poll of the Court on the suggestion for rehearing en banc, Judges Russell, Hall, Wilkinson, Wilkins, Niemeyer, Luttig, and Williams voted to deny rehearing en banc; and Judges Widener, Murnaghan, and Michael voted to grant rehearing en banc. Judges Ervin, Hamilton, and Motz did not participate in the poll of the Court.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority has voted to deny rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

FOR THE COURT

/s/ Bert M. Montague
CLERK

LIST OF OTHER STATUTES IN WHICH CONGRESS UTILIZED PHRASE "RIGHT OF FIRST REFUSAL"

1. 7 U.S.C. §1738p(d)(2) – Enterprise for the Americas Initiative Act of 1992. Giving certain foreign countries a right of first refusal to purchase their own debt before debt may be sold, reduced or canceled by the President of the United States.

2. 7 U.S.C. §1985(e)(1)(E) – Consolidated Farmers Home Administration Act of 1961, as amended. Stating that rights provided to farmers under the statute are "in addition to any such rights of first refusal under the law of the State in which the property is located."

3. 7 U.S.C. §2000(d) – Food Security Act of 1985, as amended. Giving farmers right of first refusal to acquire homestead property and providing that the "terms and conditions [of the right] shall not be less favorable than those intended to be offered to any other buyer."

4. 10 U.S.C. §2835(f) – National Defense Authorization Act for Fiscal Years 1992 and 1993. Giving the United States "the right of first refusal to acquire all right, title, and interest" in certain military housing facilities.

5. 12 U.S.C. §1701z-11(e) – Housing and Community Development Amendments of 1978, as amended. Giving State and local governments a right of first refusal to purchase multifamily housing projects owned by Secretary of Housing and Urban Development.

6. 12 U.S.C. §2219a – Agricultural Credit Act of 1987. Giving farmers right of first refusal to purchase or lease property of theirs that has been foreclosed upon.

7. 12 U.S.C. §4111(b)&(c) – Cranston-Gonzales National Affordable Housing Act, as amended. Giving "priority purchasers" the right of first refusal to purchase certain eligible low-income housing.

8. 16 U.S.C. §159g(b) – Act to Revise Boundaries of Saratoga National Historical Park. Giving Secretary of the Interior a right of first refusal to purchase any privately owned land in the Saratoga National Historical Park that is to be put up for sale.

9. 16 U.S.C. §460x-11(e)(3) – Act to Establish Sleeping Bear Dunes National Lakeshore, as amended. Giving Secretary of the Interior a right of first refusal to purchase certain scenic land in the Sleeping Bear Dunes National Lakeshore area.

10. 16 U.S.C. §460aaa-3(a) – Act to Establish Grand Island National Recreation Area. Giving Secretary of the Interior a right of first refusal to purchase certain land within the Grand Island National Recreation Area.

11. 16 U.S.C. §698k – Act to Establish Big Cypress National Preserve, as amended. Requiring Secretary of the Interior to offer to the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida the right of first refusal to provide revenue-producing visitor services in the Big Cypress National Preserve.

12. 16 U.S.C. §1246(e) – National Trails System Act, as amended. Requiring Secretary of the Interior or Secretary of Agriculture to offer right of first refusal to original owner of land acquired by either Secretary for inclusion in the national scenic or national historic trail in the event that the trail is permanently relocated.

13. 16 U.S.C. §3197(b)(3) – Alaska National Interest Lands Conservation Act. Requiring Secretary of the Interior to give right of first refusal to Cook Inlet Region, Incorporated, in cooperation with Village Corporations within the Cook Inlet Region, when appropriate, to provide new revenue-producing visitor services within the Kenai National Moose Range or that portion of the Lake Clark National Park and Preserve within the boundaries of the Cook Inlet Region.

14. 20 U.S.C. §1132f-7(d) – Higher Education Amendments of 1986. Giving Student Loan Marketing Association a right of first refusal to purchase all of the voting common stock owned by the Secretary of Education in the College Construction Loan Insurance Corporation.

15. 24 U.S.C. §225(b)(4) – Saint Elizabeths Hospital and District of Columbia Mental Health Services Act. Granting former employees of Saint Elizabeths Hospital in Washington, D.C., a right of first refusal to acquire employment in comparable positions created by the District of Columbia.

16. 24 U.S.C. §225d(d)(1) – Saint Elizabeths Hospital and District of Columbia Mental Health Services Act. Granting former employees of Saint Elizabeths Hospital "a right-of-first-refusal to employment in comparable available positions for which they qualify within the Department of Health and Human Services in the Washington metropolitan area."

17. 26 U.S.C. §42 – Internal Revenue Code. Providing that "[n]o Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified

low-income building merely by reason of a right of 1st refusal held by the tenants . . . . "

18. 40 U.S.C. §1205(a)(5)(C) – Judiciary Office Building Development Act. Granting to Chief Justice of the United States a right of first refusal to use unoccupied space in buildings that were constructed to meet the needs of the judicial branch.

19. 42 U.S.C. §2113(b) – Uranium Mill Tailings Radiation Control Act of 1978, as amended. Requiring Nuclear Regulatory Commission to grant right of first refusal for use of land to person who transferred such land to the Commission should Commission determine that use of the land would not endanger the public health, safety, welfare, or environment.

20. 42 U.S.C. §3025(b)(5)(B) – Older Americans Act of 1965, as amended. Requiring State agency to give right of first refusal to unit of general purpose local government whenever a State agency designates a new area agency on aging.

21. 42 U.S.C. §12705b – Removal of Regulatory Barriers to Affordable Housing Act of 1992. Stating that policies that have served to create or preserve, or that can be shown to create or preserve, housing for low- and very low-income families, such as rights of first refusal, shall not be construed as "regulatory barriers to affordable housing."

22. 43 U.S.C. §1314(b) – Submerged Lands Act. Granting United States a right of first refusal, in time of war or when necessary for national defense, in all natural

resources and submerged lands which are owned by States or others.

23. 43 U.S.C. §1341(b) – Submerged Lands Act. Granting United States right of first refusal, in time of war or when President shall so prescribe, to purchase at market price "all or any portion of any mineral produced from the outer Continental Shelf."

24. 43 U.S.C. §1621(g) – Alaska Native Claims Settlement Act, as amended. Granting United States a right of first refusal to purchase land in the National Wildlife Refuge System owned by any Village Corporation.

25. 43 U.S.C. §1722(a) – Federal Land Policy and Management Act of 1976. Requiring Secretary of the Interior to grant right of first refusal to contiguous landowners in public lands subject to unintentional trespass.

26. 49 U.S.C. §10910(h) – Staggers Rail Act of 1980. Requiring railroad that purchased a railroad line from another carrier to offer a right of first refusal to carrier that originally sold the line before purchasing railroad may sell or abandon all or any portion of the railroad line.